Supreme Court, U.S.
FILED
JAN 19 1983
ALEXANDER L. STEVAS
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1177

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THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYDS AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

-against-

UNITED STATES OF AMERICA, BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN AND DENNIS L. HUNTER,

Respondents.

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# MOTION TO DEFER CONSIDERATION OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

WALTER E. RUTHERFORD
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NEW YORK, NEW YORK 10004

COUNSEL FOR PETITIONERS

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYDS AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

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NOW COMES the Petitioners and respectfully moves this Court to defer consideration of petitioners' Petition for Writ of Certiorari, filed on January 14, 1983, until such time as the Court of Appeals for the Fourth Circuit has rendered a final decision on Eastern Air Lines' Petition for a Rehearing and Suggesting Rehearing in banc in petitioners' and Eastern's consolidated appeal to the Court of Appeals for the Fourth Circuit.

1. The question presented by petitioners in their Petition for Writ of Certiorari is:

Whether opposing counsel's conduct during trial, which was characterized by the dissenting Judge below as "outrageous misbehavior" and which rendered the trial a "travesty," and which was sanctioned by the majority opinion below, was such a departure from the accepted and usual course of judicial proceedings so that petitioners were denied a fair jury trial against the individual respondents and prejudiced in their case against the respondent United States.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Judgment of the Court of Appeals was entered on June 4, 1982. A timely Petition for a Rehearing in banc was denied on August 19, 1982. On December 16, 1982, an order was entered by this Court extending petitioners' time to file for writ of certiorari to January 14, 1983, and on January 14, 1982 petitioners filed their Petition for Writ of Certiorari.

3. This motion to defer consideration of petitioners' Petition for Writ of Certiorari is requested for the following reasons:

On June 2, 1981, petitioners' and Eastern's appeal was consolidated, and on June 4, 1982, the panel of the Court of Appeals rendered an opinion dismissing petitioners' Complaint and affirming, by majority, the Judgments against Eastern in two passenger cases but reversing judgment against Eastern in a wrongful death action.

Both Eastern and petitioners filed timely Petitions for Rehearing in banc in the Court of Appeals. However, since the Court of Appeals had not rendered a decision on

Eastern's Petition for a Rehearing on November 17, 1982, the original date for petitioners to file for writ of certiorari, this Court granted petitioner's motion and extended petitioners' time to file for writ of certiorari to January 14, 1983. On December 23, 1982, the Court of Appeals entered an order, annexed hereto as Appendix A, granting Eastern's Petition for a Rehearing in banc subject to the condition that the parties file supplemental briefs on the issue of whether rehearing in banc had been properly authorized and an order, annexed hereto as Appendix B, establishing a briefing schedule. In addition, the chief clerk of the Court of Appeals, by letter dated December 27, 1982, informed counsel that the cases had been tentatively calendared for the rehearing at the February 1983 session, and a copy is annexed hereto as Appendix C.

Although petitioners have filed their Petition for Writ of Certiorari, since both Eastern and petitioners raised the issue of counsel's outrageous misbehavior during trial on their appeals to the Court of Appeals, it would appear appropriate that this Court defer consideration of petitioners' Petition for Writ of Certiorari until such time as the Court of Appeals has rendered its final decision on Eastern's Petition for Rehearing in banc.

If the Court of Appeals denies Eastern's Petition for a Rehearing in banc, Eastern will probably petition to this Court, and if the Court of Appeals reverses the Panel below, their opinion will probably be applicable to this Court's consideration of petitioners' Petition for Writ of Certiorari.

WHEREFORE, petitioners respectfully pray that this Court defer consideration of petitioners' Petition for Writ

of Certiorari until such time as the Court of Appeals for the Fourth Circuit has rendered its final decision on Eastern's Petition for a Rehearing in banc.

Dated: New York, New York
January 18, 1983

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Petitioners

By Walter E. Rutherford
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FILED
DEC 23 1982
U. S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1245

Richard Arnold, IV, Appellee,

versus

Eastern Air Lines, Inc., Appellant,

versus

United States of America, Appellee.

---

No. 80-1246

Francis C. Mihalek, Appellee,

versus

Eastern Air Lines, Inc., Appellant,

versus

United States of America, Appellee.

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No. 80-1247

Helen Rae Weston, etc., Appellee,

versus

Eastern Air Lines, Inc., Appellant.

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No. 80-1334

The Aetna Casualty and Surety Company, et al, Appellants,

versus

United States of America, et al, Appellees.

APPENDIX A

ORDER

The petition for rehearing and suggestion for rehearing in banc on behalf of Eastern Air Lines, Inc., and the responses thereto having been read and considered; a poll on the suggestion for rehearing in banc having been requested; and Judge Ervin having recused himself, Judges Winter, Russell, Widener, Murnaghan and Chapman having voted to grant rehearing in banc and Judges Hall, Phillips and Sprouse, together with Judge Butzner who voted before he took senior status, having voted to deny rehearing in banc, it is ORDERED that the petition for rehearing in banc is granted, subject to the condition that the parties file supplemental briefs, in accordance with a schedule to be fixed by the Clerk, on the issue of whether rehearing in banc has been properly authorized and be prepared to argue their views when the case is reached for reargument. See, e.g., Zahn v. International Paper Co., 469 F.2d 1033 (2 Cir. 1972), affirmed on other grounds, 414 U.S. 291 (1973); Boyd v. Lefrak Organization, 517 F.2d 918 (2 Cir. 1975); Schenker v. Baltimore & Ohio RR., 374 U.S. 1, 4-5 (1963); Comment, Federal Jurisdiction and Practice, 47 St. John's L. Rev. 339, 348 (1972). After briefing and argument, the court will make a final ruling as to whether the rehearing in banc has been properly authorized.

FOR THE COURT

Harrie L Winter

Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
DEC 23 1982
U. S. Court of Appeals
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No. 80-1245

Richard Arnold, IV, Appellee,

versus

Eastern Air Lines, Inc., Appellant,

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No. 80-1247

Helen Rae Weston, etc., Appellee,

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No. 80-1334

The Aetna Casualty and Surety Company, et al., Appellants,

versus

United States of America, et al., Appellees.

APPENDIX B

# ORDER

In accordance with the court's order of December 23, 1982 granting the petition for rehearing en banc,

IT IS ORDERED that:

1. the parties are directed to file supplemental briefs in accordance with the court's order on or before January 19, 1983.

2. the supplemental reply brief on behalf of the appellant and appellees shall be filed on or before January 28, 1983.

For the Court - By Direction.

/s/ William K. Slate, II

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA 23219

WILLIAM K. SLATE, II
CLERK

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December 27, 1982

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Re: 80-1245, 80-1246, 80-1247, 80-1334, Eastern Air Lines, Inc., et al vs. Richard Arnold, IV, et al

Dear Counsel:

Enclosed are two orders, one is granting the petition for rehearing en banc, the second one is establishing a briefing schedule for supplemental briefs. These cases are tentatively calendared for the rehearing at the February 1983 Session.

Sincerely yours,

WILLIAM K. SLATE, II

Carol R. Lemon

By:
(Mr.) Carol R. Lemon
Chief Deputy Clerk

CRL:fls
Encls.

APPENDIX C

## CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 1983, copies of this motion to defer consideration of petitioners' Petition for Writ of Certiorari were delivered by hand to the Solicitor General of the United States, 10th Street and Pennsylvania Avenue, N.W., Room 5614, Washington, D.C. 20530.

Walter E. Rutherford
Counsel for Petitioners